

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

----

SACRAMENTO MUNICIPAL UTILITY  
DISTRICT,

Plaintiff and Appellant,

v.

DAVID KWAN,

Defendant and Respondent.

C080474

(Super. Ct. No.  
4201300143235CUMCGDS)

Plaintiff Sacramento Municipal Utility District (SMUD) filed a complaint against defendant David Kwan alleging claims for power theft, conversion, and account stated. Kwan denied any knowledge of the account in question with SMUD, arguing he was the victim of identity theft. The trial court issued a statement of decision in favor of SMUD. Ultimately, after further briefing, the trial court granted Kwan's motion for a new trial.

SMUD appeals, arguing the trial court erred in granting a new trial based on insufficient evidence. We shall affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***The Account***

In November 2011 someone called SMUD from phone number (415) 350-xxxx to set up an account for electrical services at a residence in Sacramento. The caller identified himself as David Kwan and provided Kwan's social security number and California's driver's license number. Kwan's name did not match SMUD's records as the owner of the property. SMUD contacted the owner of the property to verify a new account being set up in Kwan's name.

SMUD ran the social security and driver's license numbers through a credit reporting agency, verifying they belonged to Kwan. SMUD created an account in Kwan's name and provided electrical services to the residence from November 2011 to October 2012.

### ***Usage Check***

In August 2012 SMUD performed an amp check on the residence, which revealed the metered usage did not match the actual amount of electricity coming from the utility pole to the residence. The majority of the power did not appear on the meter.

SMUD contacted law enforcement, who responded and discovered abundant marijuana growing in the residence. The residence was unoccupied and SMUD determined that electrical service was being bypassed. SMUD disconnected the power.

An audit of the grow equipment in the residence determined the kilowatt hours being used per day. SMUD calculated the amount due for the purloined power and associated administrative charges at \$27,878.08.

### ***Complaint and Trial***

SMUD filed a complaint against Kwan in 2013, alleging power theft under Civil Code section 1882.1, conversion, and account stated. Kwan, proceeding in pro. per., answered, denying any knowledge of the account or the residence and stating he had been the victim of identity theft.

A court trial followed. Kwan represented himself in pro. per.

SMUD introduced evidence Kwan spent approximately \$800 at a hydroponics store. Kwan explained he made the purchases for a friend who repaid him.

Daniel Miller, a SMUD employee who investigated power theft, helped inventory the equipment found at the residence. Miller reviewed Home Depot purchases made with Kwan's credit card between 2010 and 2012. Miller testified many of the purchases were consistent with equipment typically used in marijuana growing. However, not all the purchases were specifically designed for that purpose.

Kwan introduced evidence he lived in Oakland during the relevant period, including a residential lease and transportation records. The transportation records showed no Sacramento area trips, although Kwan stated he had worked briefly in Elk Grove in 2011. Kwan is a carpet-installer who works on an on-call basis.

Kwan denied any connection to the phone number which had initiated the account in question. SMUD had requested Kwan's consent to obtain his cell phone records, but Kwan declined.

### ***Statement of Decision***

The court issued a notice of intended decision finding in favor of SMUD on its claims for power theft and conversion. The court found SMUD was entitled to \$27,753.31 in damages plus an award of treble damages under Civil Code section 1882.2 for total damages of \$83,259.93.

The notice of intended decision applied the evidentiary presumptions set forth in CACI Nos. 203, party having power to produce better evidence, and 205, failure to explain or deny evidence, to two pieces of evidence. The first, Kwan's subpoenaed but not produced phone records, and the second, the Home Depot and hydroponics store purchases.

According to the court, "A known phone number was used to place the [account initiating] call to SMUD yet defendant refused to let any of his records be accessed. One who had no association with a known telephone number might reasonably be expected to present evidence, or at least not block access to evidence, that could be significant in exonerating him." In addition, the court would "reasonably expect there have been some more evidence about the use of the [Home Depot purchases], and some support for the assertion that the [hydroponics store] purchases were for the friend."

Kwan filed an objection to the notice of intended decision, arguing the court misapplied CACI Nos. 203 and 205. The court subsequently issued a statement of decision, finding Kwan's objections lacked merit and noting neither party had specified any controverted issues.

### ***Motions to Vacate and for a New Trial***

After obtaining counsel, Kwan filed motions to vacate and for a new trial. Kwan moved for a new trial under Code of Civil Procedure section 634,<sup>1</sup> arguing the trial court's decision was not supported by the facts and referring to newly discovered evidence. Kwan argued the court should grant a new trial on the issue of whether he blocked access to phone records.

In supplemental briefing, Kwan submitted supplemental declarations by both himself and his sister. In his declaration Kwan stated he had never used the cell phone

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise designated.

number used to establish the account in question. Although Kwan and his sister had attempted to obtain the records from Verizon, they were told no records beyond one year were available without a subpoena. After he received a copy of SMUD's subpoena to Verizon for both his number and the number used to set up the account, Kwan did not object.

Kwan's sister submitted a declaration stating that she owned the plan covering Kwan's cell phone. Neither she nor Kwan objected to SMUD's subpoena to Verizon for cell phone records for Kwan's phone or the number used to set up the account.

As for the Home Depot purchases, Kwan argued the purchases represented, at most, a minor fraction of items similar to those found at the residence.

On September 3, 2015, following oral argument, the trial court granted Kwan's motion for a new trial. SMUD objected to the proposed order and on October 30, 2015, the court issued an order clarifying its ruling on the motion for a new trial. SMUD filed a timely notice of appeal.

## **DISCUSSION**

SMUD argues we cannot affirm the trial court's order granting Kwan a new trial based on insufficiency of the evidence. According to SMUD, an order granting a new trial cannot be affirmed based on an insufficiency of the evidence unless the trial court has specified that ground in its order. In addition, the order must be timely.

Under SMUD's analysis, the original September 3, 2015 order failed to state insufficiency of the evidence as grounds for granting the new trial motion. The October 30, 2015 order, clarifying the earlier order and "identifying" insufficiency of the evidence as the grounds for the granting of a new trial was not filed within the 60-day limitations

period of Code of Civil Procedure former section 660.<sup>2</sup> SMUD notes Kwan filed his motion for a new trial on July 23, 2015, and the clarifying order granting the new trial motion was not filed until October 30, 2015, outside the jurisdictional deadline.

Our reading of the trial court's orders fails to support SMUD's conclusions. Of necessity, we provide a synopsis of both orders.

***The September 3, 2015 Order***

The court began by noting some confusion in Kwan's original motion, which requested a motion to vacate the judgment and/or grant a new trial. The court found any defects did not impact its ability to consider the motion.

The court set forth the factual basis for Kwan's motion from both the moving papers and the declarations of Kwan and his sister. Kwan stated he never used the phone number used to set up the account with SMUD and gave his actual phone number. This number was linked to a "friends and family" account with his sister. During discovery, Kwan and his sister could not obtain phone records more than a year old without a subpoena. Kwan learned of SMUD's subpoena of his phone records and elected not to file a consumer objection. The subpoenaed phone records were not introduced as evidence at trial. Instead, SMUD introduced an unsigned "Consent to Release of Records." Kwan confirmed he had no intention to provide SMUD with his cell phone records.

The court then explained the impact of this evidence: "The combined effect of the unsigned consent, Mr. Kwan's refusal, and SMUD's vigorous argument at several different stages of the trial that Mr. Kwan's refusal precluded access to information about who owned the phone number in question, persuaded the Court, sitting as trier of fact, to

---

<sup>2</sup> Pursuant to Assembly Bill No. 2230 (2017-2018 Reg. Sess.), effective January 1, 2019, the deadlines under Code of Civil Procedure section 660 were changed to 75 days. (Stats. 2018, ch. 317, § 1.)

apply the presumptions of CACI 203 and 205. The former reads: ‘You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.’ The latter reads: ‘If a party failed to explain or deny evidence against [him/her/it] when [he/she/it] could reasonably be expected to have done so based on what [he/she/it] knew, you may consider [his/her/its] failure to explain or deny in evaluating the evidence. It is up to you to decide the meaning and importance of the failure.’ ”

The court found it had been too generous in applying these presumptions in SMUD’s favor. During trial, SMUD introduced an unsigned consent form which referred to a “subpoena for production of business records” relating to “all documents and all telephone records.” However, the consent form is the second of two prerequisites to the production of documents under section 1985.3, subdivision (c)(1) and (2). The other prerequisite is to demonstrate compliance with the service and notice requirements of section 1985.3, subdivision (b), which includes notice of the right to object.

The court reasoned: “If Mr. Kwan was aware of the subpoena and was served the notice of his right to object, as described in subsections (c)(1) and (b), and if he elected not to object, then his failure to sign the consent form described in subsection (c)(2) is scarcely relevant. In the ordinary course of events, in the absence of a consumer objection, Verizon should have provided the records based on SMUD’s compliance with subsections (c)(1) and (b). In fact, the CACI 203 presumption might just as well weigh against SMUD. SMUD’s decision not to introduce the subpoenaed records into evidence might give rise to the presumption that the records did not favor SMUD’s case. At a minimum, SMUD should have been asked to explain the absence of the subpoenaed records before urging the application of the evidentiary presumption against Mr. Kwan.”

Following this analysis of the evidence, or lack of evidence, before the trial court, the court concluded: “Mr. Kwan’s ‘refusal’ to grant access to his phone records was not the only piece of circumstantial evidence relied upon in the Court’s decision, but it was

significant. Absent the CACI presumptions' application to the issue of phone records, the trier of fact might reasonably have concluded that Mr. Kwan had nothing to do with the account originating phone number. Furthermore the case against Mr. Kwan was based entirely on circumstantial evidence and there was no evidence as to the identity of the legal owner of the real property in question and whether or not he had any tenants and a property manager. *Given the relative paucity of evidence in this case, it is apparent to the court that not applying the presumption could have changed the outcome of the trial.*" (Italics added.)

### ***The October 30, 2015 Order***

In its October 30, 2015 order the court reviewed Kwan's proposed order and SMUD's objections. As for the September 3, 2015 order, the court stated: "The Court's ruling was based on insufficiency of the evidence to support application of the CACI presumptions upon which the decision rested. Section 657(6) recognizes insufficiency of the evidence as a valid cause for granting a motion for new trial. The reasoning is discussed at length in the September 3 ruling."

Because the September 3 ruling provided a statement of reasons for granting the new trial motion, the court determined no proposed new order was necessary.

### ***Basis for the Grant of a New Trial***

Both parties agree that we review the grant or denial of a motion for a new trial for an abuse of discretion. All presumptions are indulged in favor of the new trial order, which we affirm if it can be sustained on any ground raised by the motion, whether or not it is the ground specified by the trial court. (§ 657; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.)

SMUD argues "[a] written order specifying the grounds filed outside the jurisdictional time limits is defective and cannot support the granting of a new trial based on insufficiency of the evidence." Under SMUD's analysis, the September 3, 2015 order



did not state the grounds upon which the motion was granted. “That articulation did not come until October 30, 2015, when the court issued a minute order ‘clarifying’ its ruling and identifying insufficiency of the evidence as the grounds for granting the new trial.” Since the October 30, 2015 order was beyond the limitations period set forth in former section 660 it was ineffective. In support, SMUD relies on *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892.

Kwan contends the trial court was specific in its reasoning in the September 3, 2015 order and fully complied with the requirements of former section 660. In response, SMUD counters: “Kwan has conflated the requirement for a specification of reasons with that for a statement of the statutory grounds upon which a motion for new trial is granted.” According to SMUD, the two, grounds and reasons, are independent, mandatory requirements: “Here, of course, the defect is the failure to specify the *grounds* for granting a new trial, not the failure to specify reasons.”

Our review of the trial court’s September 3, 2015 order undercuts SMUD’s attempt to claim a paucity of “grounds” for granting the order. The trial court carefully recounted the facts set forth in the prior proceedings; the “reasons” as labeled by SMUD. After discussing these facts, the court set forth its conclusion and grounds for granting Kwan’s new trial motion: “Given the relative paucity of evidence in this case, it is apparent to the court that not applying the presumption could have changed the outcome of the trial.” While the court did not use the phrase “insufficiency of the evidence,” its original order clearly and explicitly stated the “paucity of the evidence . . . could have changed the outcome of the trial.”

### **DISPOSITION**

The judgment is affirmed. Kwan to recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RAYE, P. J.

We concur:

ROBIE, J.

RENNER, J.